

ARKANSAS SUPREME COURT

No. 05-1344

NOT DESIGNATED FOR PUBLICATION

JOHN R. LUKACH
Appellant

v.

LARRY NORRIS
Appellee

Opinion Delivered

March 23, 2006

PRO SE MOTIONS TO FILE BELATED BRIEF;
TO FILE HANDWRITTEN BRIEF AND FOR
EXTENSION OF TIME TO FILE BRIEF; AND
FOR APPOINTMENT OF COUNSEL [APPEAL
FROM THE CIRCUIT COURT OF LEE
COUNTY, CV 2005-88, HON. HARVEY LEE
YATES, JUDGE]

APPEAL DISMISSED; MOTIONS MOOT

PER CURIAM

John R. Lukach, an inmate in the custody of the Arkansas Department of Correction, filed a *pro se* petition for writ of *habeas corpus* in the circuit court of the county where he was incarcerated. An order denying the petition for writ of *habeas corpus* was entered in Lee County Circuit Court on August 25, 2005, and the record has been lodged here on appeal. Appellant failed to file his brief within the time required, although he tendered a brief after the date due, and now seeks leave to file a belated brief, to file a handwritten brief and extend the time to file his brief, and to have counsel appointed. We need not consider the motions or the affidavit filed in support of those motions, as it is apparent that appellant could not prevail in this appeal if permitted to go forward because he has failed to demonstrate a ground for the writ.¹

This court has consistently held that an appeal of the denial of postconviction relief, including an appeal from an order that denied a petition for writ of *habeas corpus*, will not be permitted to go forward where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (*per curiam*); *Reed v. State*, 317 Ark. 286, 878

¹ The appellee has also filed a motion to dismiss due to the failure of appellant to timely file a brief. Because of our holding, there is no need to consider that motion.

S.W.2d 376 (1994) (*per curiam*). Here, it is clear that the petition failed to state sufficient grounds for *habeas* relief.

The grounds for relief in the petition were as follows: (1) that the judgment was invalid because the information was insufficient in that the petitioner did not receive a plea arraignment, because no order was entered showing that trial counsel was appointed, and because the prosecution should have been disqualified as a potential witness; (2) that the judgment was invalid because the crimes were committed in, and petitioner was charged in, Hot Spring County, but he was tried in Grant County; (3) that the charging instrument was insufficient, and that counsel at trial and on appeal was ineffective; (4) that the evidence at trial was insufficient to convict him; (5) that the verdict forms were defective; (6) that petitioner's appeal was invalid because it listed Hot Spring County rather than Grant County as the origin of the judgment, and that counsel at trial and on appeal was ineffective. None of these claims is sufficient to demonstrate grounds for a writ of *habeas corpus* to issue.

It is well settled that the burden is on the petitioner in a *habeas corpus* petition to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face; otherwise, there is no basis for a finding that a writ of *habeas corpus* should issue. *Young v. Norris*, ___ Ark. ___, ___ S.W.3d ___ (February 2, 2006) (*per curiam*); *see also Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990) (*per curiam*). The petitioner must plead either the facial invalidity or the lack of jurisdiction and make a "showing, by affidavit or other evidence, [of] probable cause to believe" he is illegally detained. Ark. Code Ann. 16-112-103 (1987). *Young, supra*; *see also Wallace v. Willock*, 301 Ark. 69, 781 S.W.2d 478 (1989); *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991). A *habeas corpus* proceeding does not afford a prisoner an opportunity to retry his case, and is not a substitute for direct appeal or postconviction relief. *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000).

While appellant attempted to couch the majority of his claims as defects that result in an invalid judgment or a lack of jurisdiction, the bases for those claims are clearly issues that should

have been raised on appeal or in a petition under Ark. R. Crim. P. 37.1. Ineffective assistance of counsel is not a claim cognizable in a *habeas corpus* proceeding.² Sufficiency of the evidence, irregularities at trial such as appellant's issues with the verdict forms, whether or not a proper arraignment was conducted, and potential conflicts involving the prosecutor, are all factual issues that should have been addressed on appeal. See *Friend v. Norris*, ___ Ark. ___, ___ S.W.3d ___ (December 1, 2005) (*per curiam*). The petition asserted that the charging instrument was insufficient in that the charges were inconsistent with the conviction, but the information does reflect the same charges as appear on the judgment. None of these claims would support issuance of the writ.

Appellant raised in his petition questions framed as jurisdictional issues concerning the venue of the trial. Venue questions, however, are questions of local jurisdiction, not issues of subject-matter jurisdiction, and, unlike true questions of subject-matter jurisdiction, may be waived. See *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994). Local jurisdiction deals with where an offense is to be tried, and not with whether the state lacks the basic authority to apply its law to the events in question. See *State v. Osborn*, 345 Ark. 196, 45 S.W.3d 373 (2001). Here, appellant alleged in his petition that the trial was held in Grant County and the judgment entered there. The record is in accord. The petition also asserted that the record was therefore false because it indicates that the case was initiated in Hot Spring County. However, as appellant noted in the petition, the judgment indicates there was a change of venue for the trial from Hot Spring County. While the petition complains that the record does not disclose a motion or order for change of venue, any objection concerning the procedure for that change of venue was waived when appellant failed to raise the issue at trial or on appeal, provided the trial was held within the same judicial district.

² The petition seemed to assert that appellant was not represented by counsel at trial. However, as noted, the petition also alleged ineffective assistance of counsel at trial. The record reflects that appellant was represented by counsel at trial and on appeal. To the extent that appellant argues counsel was never appointed because no order was entered, once again, the record shows otherwise. The petition acknowledged the appointment was noted on the docket, and an order entered July 8, 1991, acknowledges appointment of Larry W. Horton as attorney for the defendant, and addresses purported fraud in appellant's representation that he was indigent. Mr. Horton moved to withdraw, but the motion was not granted.

Local jurisdiction, or, as sometimes referenced, territorial jurisdiction, is controlled by statute. *Ridling v. State*, ___ Ark. ___, ___ S.W.3d ___ (January 27, 2005). Arkansas Code Annotated § 16-88-105 (1987) limits jurisdiction of circuit courts to “offenses committed within the respective counties in which they are held.” The crimes charged here were committed in Hot Spring County, the information was filed there, and the initial proceedings were conducted there. The same circuit court judge, the Honorable John W. Cole, however, conducted the trial in Grant County, which at that time, was within the same judicial district as Hot Spring County.

A circuit judge has the authority to preside over proceedings in any courtroom, in any county, within the judicial district for which that judge was elected. *Davis*, 316 Ark. at 578, 873 S.W.2d at 525-526. Judge Cole therefore had authority to conduct the trial in Grant County and jurisdiction was proper. The only question was whether venue was appropriate. As in *Davis*, the appellant here waived any question of venue by failing to object to venue in Grant County.

None of appellant’s claims was sufficient to establish that the commitment was invalid on its face or that the trial court was without jurisdiction. Each of appellant’s claims should have been raised in an earlier proceeding. Because appellant failed to state cognizable claims, he did not meet his burden and has failed to show any basis for a finding that a writ of *habeas corpus* should issue. As we must dismiss the appeal, appellant’s motions are moot.

Appeal dismissed, motions moot.